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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91208923
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

MT. EDEN ORGANICS, Inc.,)	
)	
Opposer,)	Opposition No. 91208923
)	Serial No. 85/631,038
)	Mark: NATIVE NUTRIENTS
v.)	
)	
NATIVE NUTRIENTS,)	
)	
)	
Applicant.)	
)	
)	
)	

APPLICANT'S TRIAL BRIEF
(General Submission)

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I. INTRODUCTION

Opposer, Mt. Eden Organics ("Opposer") has opposed Applicant's serial no. 85/631,038 for the mark NATIVE NUTRIENTS for various plant fertilizers on the grounds of priority and likelihood of confusion with its alleged common-law mark NATIVE NUTRIENTS, also for plant fertilizers. Applicant does not dispute that the marks are identical and likely to cause confusion; however, Applicant, not Opposer, has priority of use of the mark. Thus, the sole issue in this case to be determined is whether Opposer can show, by a preponderance of the evidence, that it has priority of use of NATIVE NUTRIENTS for its plant fertilizers.

II. STATEMENT OF THE ISSUE

Whether Opposer has met its burden of proving, by a preponderance of the evidence, that it has priority of use of NATIVE NUTRIENTS for plant fertilizers within the meaning of Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d).

III. DESCRIPTION OF THE RECORD

Applicant has made the following evidence of record:

- A. The Trial Deposition of Tasha Juliene Sparks, partner of Applicant, Native Nutrients;
- B. The Trial Deposition of Mathew Ruben Mattz, partner of Applicant, Native Nutrients;
- C. Notice of Reliance on Opposer's Responses to Applicant's First and Second Sets of Interrogatories;

Opposer has made the following evidence of record:

- A. The Trial Deposition of Lee McPherson, principal and sole shareholder of Opposer, Mt. Eden Organics, Inc.

IV. STATEMENT OF FACTS

1. Applicant Native Nutrients

Applicant, NATIVE NUTRIENTS ("Applicant"), is a California partnership composed of Mathew Mattz, Kirk Sparks, and his daughter, Tasha Sparks. Deposition of Tasha Sparks ("Sparks Depo."), TTABVUE Dkt. #20, at pp. 8-9. The Gasquet, California-based trio formed the partnership in mid-2010 for the purpose of producing and selling liquid organic kelp fertilizers, which are essentially plant fertilizers. *Id.* They formed the partnership while all three of them worked together for another fertilizer company. *Id.* at pp. 7-8. Conditions were not favorable at their employer's company, and sometime in 2012, Mathew, Kirk and Tasha left to focus on Native Nutrients full time. *See id.* at p. 7; Deposition of Mathew Mattz ("Mattz Depo."), TTABVUE Dkt. # 21, at pp. 8-10. Mathew Mattz chose the name "Native Nutrients" for the partnership because he is a member of the Yurok, a Native American tribe located in Northern California. Mattz Depo. at p. 14.

On December 12, 2010, Native Nutrients made its first documented sale of NATIVE NUTRIENTS-brand plant fertilizer to a customer. Sparks Depo., pp. 16-21, Ex. 11. Specifically, on December 12, 2010, Tasha Sparks personally sold one 2.5-gallon container of liquid kelp fertilizer to a customer named Heather Laughlin located in Bethel Island, California, for a total of \$30. *Id.* This product bore a hand-written NATIVE NUTRIENTS label, and her customer saw this label when she purchased the product. *Id.* Tasha Sparks hand-wrote a receipt for the purchase, dated "12/12/10", and gave it to Ms. Laughlin. *Id.* This first sale was made on behalf of the Native Nutrients partnership. *Id.*

Native Nutrients' second sale of NATIVE NUTRIENTS fertilizer occurred four days later, on December 16, 2010. Mattz Depo. at pp. 17-24, Ex. 1. Specifically, on December 16, 2010, Mr. Mattz personally sold a 55-gallon drum of NATIVE NUTRIENTS fertilizer to a customer named Bob Adams for a total of \$400, paid in cash. *Id.* The side of the drum labeled NATIVE NUTRIENTS, with letters of about 1 to 1.5 inches in size, and Bob Adams saw the NATIVE NUTRIENTS label appearing on the drum. *Id.* Mr. Adams thought the name NATIVE NUTRIENTS appearing on the drum was funny because Mr. Mattz was Native American, and the two joked together about the name at the time of the sale. *Id.* at pp. 40-41. Mr. Mattz's wife, Sarah Mattz, created the receipt for the sale by hand, at Mr. Mattz's direction and using the information he provided about the sale. *Id.* at pp. 23-24. The receipt shows the word "MAT" referring to Mr. Mattz appearing under the word "SALESMAN". *Id.* at p. 22. The receipt is dated "12/16/2010", indicating the date of the sale.

In addition to these first two sales on December 12th and December 16th, 2010, Mathew Mattz, Kirk and Tasha Sparks made numerous additional sales of NATIVE NUTRIENTS fertilizers in January, February, and March of 2011, many of which are documented by handwritten, dated receipts bearing the NATIVE NUTRIENTS mark, generally listing the quantity of fertilizer sold, the price paid, and the name of the purchaser. *See generally*, Sparks Depo., Exs. 11-14; *see generally* Mattz Depo., Exs. 1-3. All of the receipts were created at or near the times of the sales, personally Mr. Mattz or his wife, or by Kirk or Tasha Sparks; and were made as a regular practice of their fertilizer business, and kept in the course of their regular business activities.¹ *Id.* All of these fertilizers sold in December of 2010 and early 2011 bore a handwritten label showing NATIVE NUTRIENTS. *Id.* Thus, in addition to being the name of the

¹ Thus, these receipts satisfy the elements of the business records exception to the hearsay rule. Federal Rule of Evidence 803(6).

partnership, NATIVE NUTRIENTS is the name of Applicant's fertilizer product, first sold on December 12, 2012.

Sometime in 2011, Native Nutrients hired a professional designer to create a new product label, and the partners began applying this new label to their fertilizers toward the end of 2011. Sparks Depo. at pp. 36-38, Ex. 4. As shown on the label, the word NATIVE NUTRIENTS is prominently featured in large letters. *Id.* Native Nutrients continued to sell its NATIVE NUTRIENTS products throughout 2011, 2012, 2013, and 2014. Mattz Depo. at p. 43. Its customers are individuals and agricultural stores, including online stores such as *www.groworganic.com*, *Sunlight Supply*, and *Dazey's Supply*. *See, e.g.*, Sparks Depo. at pp. 40-42, Exs. 7-9; Mattz Depo. at p. 14, Exs. 1-3.

Aside from word-of-mouth advertising, Native Nutrients advertised their NATIVE NUTRIENTS fertilizers by distributing business cards in 2011. Mattz Depo. at p. 55., Ex. 10. They began distributing brochures sometime toward the end of 2012; Sparks Depo. at p. 39, Ex. 6; and promoted NATIVE NUTRIENTS fertilizers at a trade show in 2012. Mattz Depo. at p. 56. The product was advertised in a newspaper called the Daily Triplicate in the beginning of 2013. *Id.* at pp. 38, Ex. 5. Native Nutrients currently operates its own website promoting the goods. Mattz Depo. at p. 56.

On May 21, 2012, Applicant filed U.S. trademark application serial number 85/631,038 for the mark NATIVE NUTRIENTS ("Applicant's Mark") for use in connection with "Fertilizers for agricultural use; Marine fertilizer; Organic fertilizers; Plant growth nutrients" in International Class 1. Applicant listed its "first use" of the mark as November 28, 2011; however, Applicant estimated this date incorrectly based on the date the California Department of Food and Agriculture ("CDFA") issued its fertilizing material license on December 13, 2011, rather than

its actual first sale of the product.² It is clear that Native Nutrient's actual first sale of NATIVE NUTRIENTS was to Heather Laughlin on December 12, 2010, established by Tasha Sparks' clear testimony and a copy of the actual receipt issued to the customer on that day. Sparks Depo., pp. 16-21, Ex. 11.

2. Opposer Mr. Eden Organics

Opposer, Mt. Eden Organics, Inc. is a producer of plant fertilizers, also based out of Northern California. Deposition of Lee McPherson ("McPherson Depo."), TTABVUE Dkt. #15, at pp 9-11. Opposer's sole principal and shareholder is Lee McPherson. *Id.* at 59. Opposer sells a plant fertilizer consisting of mushroom compost which it calls NATIVE NUTRIENTS. Opposer's Brief at 6. Applicant's Mathew Mattz, who has worked in the fertilizer industry for over nine years, had never heard of Opposer or its NATIVE NUTRIENTS fertilizer until Opposer filed this opposition on January 18, 2013. Mattz Depo. at p. 58. Similarly, Tasha Sparks had never heard of Opposer until she saw Lee McPherson at trade show shortly before this opposition. *See* Sparks Depo. at pp. 49-50.

On January 18, 2013, Opposer filed this opposition, alleging that it was the first to sell NATIVE NUTRIENTS fertilizers "**since as early as March of 2011**". Notice of Opposition, ¶ 2. Opposer filed the opposition because its U.S. trademark application serial no. 85/760,914 for

² Applicant filed the application without the assistance of an attorney, incorrectly listing its "first use" and "first use in commerce" dates as November 28, 2011, and February 6, 2012, respectively. Applicant erroneously believed that "first use" referred to the date the CDFA issued its fertilizing material license on December 13, 2011, and that "first use in commerce" referred to the date the CDFA issued a separate license for its NATIVE NUTRIENTS "Kelp Help" product line on February 14, 2012. The dates listed in the trademark application roughly, but do not exactly correspond with the CDFA licensure dates. Opposer has never made an issue of these dates, and the topic was not discussed during the trial depositions of Tasha Sparks and Mathew Mattz.

NATIVE NUTRIENTS for various plant fertilizers,³ filed on October 23, 2012, was suspended based on Applicant's prior-pending NATIVE NUTRIENTS application. *See* Opposer's Brief at 13.

Similar to the Notice of Opposition, Opposer's application ser. no. 85/760,914 contains an alleged "first use" date of **March 21, 2011** for both its "first use anywhere" and "first use in commerce" dates. Despite Opposer's clear admission—twice—once in its complaint and again in its trademark application—that its first use was in March of 2011, it now asks the Board to believe that it sold NATIVE NUTRIENTS fertilizers *three years earlier*, in June of 2008.

3. Opposer Changed its "First Use" Date During Discovery and Produced Highly Questionable "Newly Discovered" Invoices

After Opposer filed the opposition, but before discovery commenced, Applicant proposed an informal exchange of the parties' earliest invoices and receipts in order to determine which party had earlier use of NATIVE NUTRIENTS. McPherson Depo. at pp. 81-82. The purpose of the exchange was to avoid the expensive discovery process in favor of an early review of the parties' documents to quickly determine which party possessed earlier proof of use of its mark. After all, the only issue in this case is which party used the mark first. Opposer declined Applicant's informal requests for an early exchange of documents, *id.*, choosing instead to serve formal discovery requests on Applicant on June 20, 2013.

Applicant responded to Opposer's discovery requests, producing its earliest sales receipts for NATIVE NUTRIENTS fertilizers dating back to December 12, 2010. *See, e.g.,* Sparks Depo., Ex. 11. Upon receiving Applicant's receipts showing its sales as early as December 12, 2010—predating Opposer's pleaded "first use" in March of 2011—Opposer suddenly changed its

³ "Compost; Compost; Growing media for plants; Natural fertilizers; Organic fertilizers; Plant growth nutrients" in International Class 1

story, claiming that its first use was actually in June of 2008, almost *three years* earlier. See Applicant's Notice of Reliance, TTABUVE Dkt. #13, Opposer's Responses to Applicant's First Set of Interrogatories, Ex. A ("Interrogatory Responses"), No 1; *see also* Notice of Opposition, ¶ 2; *see also* Opposer's trademark application ser. no. 85/760,914.

When asked to explain why Opposer changed its first use to a date nearly *three years* earlier, Opposer's sole principal, Lee McPherson, testified that there was a "lot of confusion" surrounding his first use date:

Q. Why did you indicate that your first sale of Native Nutrients products was March 21st, 2011, in your trademark application?

A. Well, I suppose, as you can see, there's a lot of confusion as to figuring out that exact date. I'm not as well versed in terms of the logistic side of deciding that date. I try to just offer up whatever I have and keep everybody informed as I sort of figure it out as well.

McPherson Depo. at p. 66. He believed March 21, 2011 was the date of his first sale when he filed his trademark application (ser. no. 85/760,914), but that "it's not [his] area of expertise to navigate trademark law" in explaining the nearly *three-year discrepancy* in his claimed first use dates. *Id.* at p. 66, 68; It is clear from the timing, however, that Opposer changed its "first use" date directly in response to Applicant's discovery responses showing its earlier first use. *See id.*, p. 76-78 (Opposer learned of its earlier "first use" date after it filed the Notice of Opposition, when it allegedly discovered "more invoices" during the discovery period).

In support of this "new" first use date in "June of 2008", Opposer produced a handful of documents of highly questionable authenticity, including:

- A handwritten invoice made out to Lee McPherson's own father, Jeff McPherson, dated June 3, 2008. *Id.*, p. 27, Ex. 17. Opposer argues this invoice shows its "first

sale" of NATIVE NUTRIENTS fertilizers in June of 2008. However, Lee McPherson testified that he merely "dumped" loose fertilizer into the back of his truck and shipped it to his father, without labeling the compost NATIVE NUTRIENTS in any way. *Id.* at 98-105; 150, 151. As explained further below, this "sale" of loose, unlabeled fertilizer shipped directly from Lee McPherson to his own father was not a legitimate, public, arms-length transaction.

- Two handwritten invoices made out to [REDACTED] and [REDACTED] both bearing dates in June of 2008. *Id.*, Ex. 16. Opposer has presumably included these to show additional sales in 2008, but Lee McPherson admitted that he never made these sales; *id.* at 97-98; and that he did not create these invoices. *Id.* at 121-122.
- Two "invoices" made out to a person vaguely identified as [REDACTED] stamped "**PAID 12/16/2010**". McPherson Depo., Exs. 10-11. Opposer testified that the sale to [REDACTED] was negotiated and transacted in person at the time of the sale, and that [REDACTED] paid cash and picked up the fertilizer in person. *Id.* at pp. 90, 94, 108-109. These invoices show the sale was wholly transacted—cash paid in exchange for the goods—on December 16th, 2010, four days after Applicant's first sale on December 12, 2010.
- Two more "invoices" made out to Lee McPherson's father, dated December 1st and December 12th, 2010. Exs. 8 and 9. These additional sales to Lee McPherson's own father were not legitimate, public, arms-length transactions; and moreover, the products were not labeled NATIVE NUTRIENTS. *See id.* at p. 120 (first sale of *labeled* products to his father occurred on or around February 23, 2011); *see also*

Opposer's Brief at 14 (Opposer ordered product labels for the first time on January 9, 2011, *after* the CDFA approved the labels).

Opposer also produced various other documents dated in December of 2010, none of which shows trademark use, such as:

- a lease agreement for a barn; McPherson Depo., Ex. 2;
- an insurance policy; *id.*, Ex. 4-5;
- an application for licensure with the CDFA; *id.*, Ex. 3;
- two invoices from a third party trucking company called [REDACTED] for "hauling mushroom compost" to Opposer (not shipments to consumers); *id.*, Exs. 6, 7; and
- an invoice from [REDACTED], a third party shipping company, for delivery of fertilizer *packaging materials* to Opposer. *Id.*, Ex. 23.

Opposer also claims that it operated a website at www.mtedenorganics.com promoting NATIVE NUTRIENTS as early as "October 2010", but Opposer's interrogatory responses flatly contradict this testimony: Lee McPherson admitted twice that the website did not exist until 2012. Interrogatory Responses, Nos. 1, 8 ("The web site and NATIVE NUTRIENTS' use thereon has been in continuous operation since being first posted on March 13, 2012"). Moreover, Opposer has not presented any documentary evidence supporting the existence of a website in 2010, and there is no data or analytics to suggest that even a *single* person saw this alleged website in 2010. Nor did Opposer sell any products through this alleged website in 2010. Simply stated, there is no evidence supporting Opposer's claim that it operated a website in 2010, and Opposer's own admissions clearly indicate that the website did not exist in 2012.

4. Lee McPherson's Story is Full of Contradictions and Inconsistencies

Lee McPherson's story is full of contradictions and inconsistencies, making it very difficult to believe. For example:

- Opposer's interrogatory responses clearly state that Opposer's revenue for sales of NATIVE NUTRIENTS fertilizer in 2010 was **\$11,000**. Interrogatories, No. 25. However, on cross examination, Lee McPherson flatly admitted that his sales in 2010 "wouldn't be much, probably under \$1,000". McPherson Depo. at p. 124. He characterizes this glaring discrepancy in his early sales revenues—which are *directly at issue in this opposition*—as "splitting the hairs on the specific numbers". *Id.* at p. 125.
- In attempting to explain his grossly inflated 2010 sales revenue of \$11,000, Lee McPherson stated "there's other products besides Native Nutrients which is generating that revenue", including the sale of an "Evolution dehumidifier", which he conceded is not even a Native Nutrients product. *Id.* at p. 125. But he had already testified earlier that mushroom compost is "the sole product" that Opposer sells. *Id.* at p. 10; *see also* Opposer's Brief at 6.
- Opposer has even boldly included the inflated 2010 sales figure in its Trial Brief. *See* Opposer's Brief at 10 ("Sales in 2010 were approximately \$11,000"). This is clearly a false statement by Opposer's own admission.
- Opposer's interrogatory responses state, "All 26,253 cubic foot bags [of fertilizer] sold bore the NATIVE NUTRIENTS label thereon". Interrogatories, No. 28. However, Lee McPherson qualified this statement at deposition, stating "[t]here may have been here and there something -- there may have been a small amount that didn't have [a label] on this product, but the majority of it definitely did", McPherson Depo. at 137. At other times,

he plainly admitted that he did not label the products at all, shipping only loose fertilizer dumped into the back of a truck to this father. *Id.* at 98-105.

- Opposer clearly stated *twice* in its interrogatory responses that it first uploaded a website promoting NATIVE NUTRIENTS in **2012**; Interrogatories, Nos. 1, 8; but now contends that the website existed in "October 2010". Trial Brief at 16.
- Opposer admitted twice that its first use of NATIVE NUTRIENTS was "as early as 2011"; Notice of Opposition at ¶ 2; Opposer's application serial no. 85/631,038; but now argues that its first use was three years earlier in 2008.

These inconsistencies raise serious questions about Lee McPherson's version of the events—particularly where the inconsistencies are directly related to Opposer's claimed early sales, not some collateral issue. Oral testimony should be clear, consistent, convincing, and uncontradicted. *See, e.g., National Bank Book Co. v. Leather Crafted Products, Inc.*, 218 USPQ 826, 828 (TTAB 1993). Further, Opposer's two admissions that it did not sell until "March of 2011" should be considered as evidence "illuminative of shade and tone in the total picture confronting the decision maker". *Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 576 F.2d 926, 198 USPQ 151, 154 (CCPA 1978). Thus, in addition to the legal reasons why Opposer cannot show priority of use, as set forth below, the Board should resolve all doubt in favor of Applicant because Opposer's testimony is inconsistent and contradictory at best, and Opposer has even plainly admitted that it did not sell until March of 2011.

V. ARGUMENT

Applicant does not dispute that the marks NATIVE NUTRIENTS are similar and likely to cause confusion. However, Opposer cannot meet its burden of proof in showing by a preponderance of the evidence that it has priority of use of NATIVE NUTRIENTS for fertilizers.

Lee McPherson's "first" sales of loose, unlabeled fertilizer directly to his father in 2008 and subsequent shipments to his father in 2010 were not bona fide sales in the ordinary course of trade and did not create any rights for Opposer. Opposer's "second" sale to [REDACTED] occurred on December 16, 2010, four days after Applicant's first sale on December 12, 2010. Opposer made no other sales between 2008-2010, and its alleged advertising on a passive website in "October 2010" (of which there is no supporting evidence whatsoever) did not create trademark rights for fertilizers. Last, Opposer's "leasing of barn space", purchase of an "insurance policy", application for fertilizer licensure with the CDFA, shipments of product *to itself* from a third party, and its mere purchase of packaging materials (intended for future use) did not create trademark rights as a matter of law.

Rather, the evidence shows that Applicant was the first to use the mark on December 12, 2010, and therefore has priority of use of NATIVE NUTRIENTS. Accordingly, Opposer has failed to show priority, and the opposition should be dismissed with prejudice.

1. Legal Standard

To establish priority on a likelihood of confusion claim brought under Trademark Act § 2(d), a party must prove that, vis-à-vis the other party, it owns "a mark or trade name previously used in the United States . . . and not abandoned" Trademark Act Section 2, 15 U.S.C. § 1052.; *T.A.B. Systems v. PacTel Teletrac*, 77 F.3d 1372, 37 USPQ2d 1879 (Fed. Cir. 1996).

"The term 'use in commerce' means the bona fide use of a mark in the ordinary course of trade, and not merely to reserve a right in a mark." 15 U.S.C. § 1127. Furthermore, a trademark is in use in commerce on goods when "(A) it is placed in any manner on the goods or their containers or the displays associated therewith ... or if the nature of the goods makes such

placement impracticable, then on documents associated with the goods or their sale, and (B) the goods are sold or transported in commerce." *Id.*

Some factors to consider in determining whether there is a "bona fide use in the ordinary course of trade" are: (1) the amount of use; (2) the nature or quality of the transaction; and (3) what is typical use within a particular industry. *See* TMEP § 901.02; *see Clorox Co. v. Salazar*, 108 USPQ2d 1083, 1086 (TTAB 2013)(finding that applicant had not made bona fide use of its mark in commerce because applicant had not sold or transported goods bearing the mark in commerce as of the application filing date).

Alternatively, proving priority through "analogous use" requires a showing of use "sufficient to create an association in the minds of the purchasing public between the mark and the [opposer's] goods." *Malcolm Nicol & Co. v. Witco Corp.*, 881 F.2d 1063, 1065, 11 U.S.P.Q.2D (BNA) 1638, 1639 (Fed. Cir. 1989). The activities claimed to create such an association must reasonably be expected to have a substantial impact on the purchasing public before a later user acquires proprietary rights in a mark. *T.A.B. Sys., supra*, 77 F.3d 1372 at 1375.

Last, it is well-settled that priority may be based on intrastate use of a mark. *Maids to Order of Ohio, Inc. v. Maid-to-Order, Inc.*, 78 USPQ2d 1899 (TTAB 2006); *Corporate Document Services, Inc. v. I.C.E.D. Management, Inc.*, 48 USPQ2d 1477 (TTAB 1998).

2. Lee McPherson's Sale of Loose, Unlabeled Fertilizer Directly to His Own Father Was Not a Bona Fide Use in the Ordinary Course of Trade

Opposer argues that its first sale of NATIVE NUTRIENTS occurred in "June 2008". Opposer's Brief at 14. This was a sale of fertilizer *directly* from Lee McPherson to his own father, Jeff McPherson. McPherson Depo., pp. 63-64. However, this was a *non-public* transaction between father and son, not an arms-length transaction with a member of the general

public. The 'nature and quality" of the transaction demonstrates a "token" sale between two family members, not a "bona fide use of the mark in the ordinary course of trade". This was Opposer's only sale of fertilizer in 2008, and there is no evidence that any other member of the consuming public ever purchased or even *saw* Opposer's alleged NATIVE NUTRIENTS fertilizers in 2008. By the same reasoning, Lee McPherson's subsequent sales "directly" to his father in 2010 were not legitimate, public, arms-length transactions and did not create any rights. McPherson Depo. at p. 86, Exs. 8, 9.

Worse still, Lee McPherson admitted that none of the products sold to his father in 2008 were labeled NATIVE NUTRIENTS; *id.* at pp. 98-105; 150, 151. He explained that he simply "dumped" loose compost into the back of a truck, without any packaging or labels showing NATIVE NUTRIENTS, and sent the compost to his father. *Id.* In fact, the first time Lee McPherson can remember selling labeled NATIVE NUTRIENTS fertilizer to his father was on February 24, 2011. *Id.* at 120. This was *after* the CDFA approved Opposer's product labels, and Opposer ordered its first product labels for use on January 9, 2011:

In December of 2010 Mt. Eden applied to register its NATIVE NUTRIENTS label with the California Department of Fertilizer and Agriculture of CDFA. . . . **After the labels were approved Mr. Eden began printing the same for use in connection with their NATIVE NUTRIENTS product . . . The labels were ordered on or about January 9, 2011.** . . .

Opposer's Brief at 14 (emphasis added); *see also* McPherson Depo., Ex. 22 (Opposer's first order of product labels).

None of these sales of loose, unlabeled fertilizer to Lee McPherson's father in 2008 or 2010 could constitute "bona fide use in the ordinary course of trade". No mark was "placed in any manner on the goods or their containers or the displays associated therewith" as required under the Trademark Act, and no consumer was ever exposed to the NATIVE NUTRIENTS

mark. Simply stated, without labeling the products with the mark, there was no trademark use. See *Clorox Co. v. Salazar*, 108 USPQ2d 1083, 1086 (TTAB 2013) (applicant had not made bona fide use of its mark in commerce because applicant had not sold or transported goods bearing the mark in commerce as of the application filing date).

Opposer also offers two handwritten invoices made out to [REDACTED] and [REDACTED] [REDACTED] dated in 2008, presumably to suggest that Opposer sold NATIVE NUTRIENTS to these two individuals in 2008. McPherson Depo., Ex. 16. However, Lee McPherson conceded that he never made these sales; id. at pp. 97-98, 102, and he did not create these invoices. Id. at pp. 121-122. These were allegedly his father's customers, and he "assumes", but cannot confirm his father created the invoices. *Id.*⁴ Inasmuch as Opposer itself never made these sales, they cannot establish priority in favor of Opposer.

Opposer may argue that Jeff McPherson acted as a "distributor" for Lee McPherson and made the sales to [REDACTED] and [REDACTED] on his son's behalf, but the fact remains that Lee McPherson never labeled any of the fertilizer before shipping to his father in 2008. Id. at pp. 98-105; 150, 151. Nor did his father apply the NATIVE NUTRIENTS mark to the fertilizer after purchase. Id. And Lee McPherson cannot remember ever seeing any products labeled NATIVE NUTRIENTS offered for sale at his father's store. Id. at pp. 104, 154. There is simply no evidence to suggest that [REDACTED] and [REDACTED] ever received or saw fertilizers actually labeled with the NATIVE NUTRIENTS mark. It is likely they did not, as Lee

⁴ Lee McPherson clearly lacks personal knowledge of the contents of these invoices and cannot authenticate them. The invoices are also hearsay, as Lee McPherson did not (and could not) satisfy the elements of the "business records" exception to the hearsay rule, Federal Rule of Evidence 803(6). See "Separate Statement of Objections", attached hereto. At a minimum, Lee McPherson is not a custodian or witness qualified to speak to his father's business records. Accordingly, these invoices are inadmissible hearsay and should not be considered, or should be given afforded little or no probative weight.

McPherson has plainly admitted that the products were not labeled in 2008. These sales of loose, unlabeled compost "dumped" into the back of a truck did not create any trademark rights for Opposer. *See Clorox Co., supra*, 108 USPQ2d at 1086 (TTAB 2013).

Overall, Lee McPherson's sales to his father in 2008 and 2010 were not public, legitimate, arms-length transactions. Rather, these were merely token sales between family members for the sole purpose of reserving a right in the NATIVE NUTRIENTS mark. Further, Opposer did not affix any NATIVE NUTRIENTS label to the products, and there is no evidence suggesting that Jeff McPherson packaged, labeled, and re-sold the compost to the public as a NATIVE NUTRIENTS product. Accordingly, none of Lee McPherson's sales of unlabeled compost to his father created rights for Opposer.

3. Opposer's Sales to [REDACTED] Post-date Applicant's First Sale by Four Days

After selling unlabeled fertilizer to his own father in 2008 and 2010, Lee McPherson claims that his next sale was to an individual vaguely identified as [REDACTED] in "December of 2010" *See* Opposer's Brief at p. 6-7; McPherson Depo. at pp. 18-19, 85. In support of these alleged sales, Opposer offers two "invoices" made out to [REDACTED] both bearing a large stamp showing "**PAID 12/16/2010**". McPherson Depo., Exs. 10, 11. Neither invoice contains any contact information for [REDACTED] and Opposer claims it does not have [REDACTED] contact information. Opposer's Responses to Applicant's Second Set of Interrogatories, Ex. B, Nos 1-2; McPherson Depo. at p. 90. Lee McPherson does not even remember [REDACTED] last name. *Id.* at 89. Because Opposer could not identify [REDACTED] Applicant did not have an opportunity to depose this alleged person regarding the sale.

When pressed for details, Lee McPherson testified that [REDACTED] requested the fertilizer verbally in person; *Id.* at p. 94; that he and [REDACTED] negotiated the purchase price in

person after [REDACTED] arrived in his vehicle; *id.* at pp. 108-109; that [REDACTED] paid cash for the products; *id.* at p. 94; and that [REDACTED] picked up the products in person on the day of the sale, by loading the bags of compost into his van. *Id.* at p. 90. Thus, according to Lee McPherson, the sale occurred when the cash was exchanged for the products in person. By the stamp appearing on both invoices showing "**PAID 12/16/2010**", it is clear that [REDACTED] paid cash for the products on December 16, 2010—the same day he requested the products, negotiated the sale, and picked up the products in his vehicle. Thus, the alleged sales to [REDACTED] could only have occurred on December 16, 2010, four days after Applicant's priority of use date of December 12, 2010.

Opposer may argue that there were two sales, one occurring on "12/5/10", an unexplained date appearing in the upper right corner of one of the invoices. McPherson Depo., Ex. 10. However, Lee McPherson's testimony does not support a sale on December 5, 2010. For example, Lee McPherson confirmed that he did not furnish the invoice to [REDACTED] by remote means, such as by email or fax. *Id.* at pp. 110, 111. He could not have mailed the invoice because he does not have [REDACTED] mailing address; nor does the mailing address appear on the invoice. Rather, he believes he *may* have "handed" the invoice to [REDACTED] sometime "after the sale", but cannot recall for sure. *Id.* at p. 109. Because we know [REDACTED] paid cash on December 16, 2010 by the "PAID 12/16/2010" stamp on the invoice, and Lee McPherson did not furnish the invoice to [REDACTED] prior to the sale, the sale could not have occurred prior to December 16, 2010. At best, Lee McPherson may have created the invoice using his computer on December 5, 2010, but the "PAID" stamp shows the actual sale was transacted (and cash received) on December 16, 2010. Accordingly, the alleged sale to [REDACTED] could only have occurred on December 16, 2010, four days after Applicant's first sale on December 12, 2010.

The Board should afford little probative weight to Lee McPherson's testimony regarding [REDACTED] particularly given his hazy recollection of the events and glaringly inconsistent statements regarding his early sales—including *two* admissions that his first sale was in March of 2011, not earlier. Notice of Opposition, ¶ 2; Opposer's application ser. no. 85/760,914. Opposer's statements are clear admissions against interest,⁵ and, when considered in light of other inconsistencies in Lee McPherson's testimony, raise serious questions about the truth of Lee McPherson's account. Accordingly, any doubt as to whether Applicant's or Opposer's first sale occurred first should be resolved in Applicant's favor.

4. Opposer's Remaining Activities Fail to Show Trademark Use

Opposer has submitted other documents dated 2010, but none of them show trademark use as a matter of law. Rather, they show that Opposer was merely *preparing* to sell NATIVE NUTRIENTS fertilizer in December of 2010, but did not actually sell until later. For example:

- Opposer argues that its "leasing of barn space" in 2010 somehow created trademark rights in NATIVE NUTRIENTS fertilizers, relying on a lease agreement. McPherson Depo., Ex. 2. However, the mere leasing of barn space is not a "use" within the meaning of 15 U.S.C. § 1127, which requires that the mark be "placed in any manner on the goods or their containers or the displays associated therewith". Nor did the mere leasing of barn

⁵ "Statements in pleadings may have evidentiary value as admissions against interest by the party that made them". TBMP § 704.06(a); *Kellogg Co. v. Pack'Em Enterprises Inc.*, 14 USPQ2d 1545, 1548 n.6 (TTAB 1990) (pleadings have evidentiary value only to the extent they contain opponent's admissions against interest); *Brown Co. v. American Stencil Manufacturing Co.*, 180 USPQ 344, 345 n.5 (TTAB 1973) (applicant having admitted in its answer that it did not use mark prior to a certain date was estopped from later contending that it has an earlier date of use). Further, "allegations and statements made . . . in an application or registration may be used as evidence against the applicant or registrant, that is, as admissions against interest and the like. TBMP § 704.03(b)(2); *see also* 704.04; *Mason Engineering & Design Corp. v. Mateson Chemical Corp.*, 225 USPQ 956, 961 n.5 and n.11 (TTAB 1985) (date of first use asserted by opposer in its application may be considered as admission against interest).

space, without any display of the mark, constitute analogous use "sufficient to create an association in the minds of the purchasing public between the mark and the [opposer's] goods." *Malcolm Nicol & Co., supra*, 881 F.2d at 1065.

- Opposer suggests that it acquired rights by purchasing an insurance policy in 2010, relying on a copy of the policy. McPherson Depo., Exs. 4-5. Similar to the leasing of barn space, the mere purchase of an insurance policy does not involve the labeling of goods or display of the mark sufficient to create consumer association of the mark with the goods. No trademark rights were created by this insurance policy.
- Opposer argues that in December of 2010, it was in the process of applying for licensure with the CDFA, and suggests that this somehow created "nontechnical" trademark rights for Opposer in 2010. Opposer's Brief, at 16. Opposer's Brief at 16. Like the leasing of barn space and purchase of the insurance policy, the mere act of applying for licensure with a government agency did not establish trademark rights. Moreover, Opposer did not submit its alleged NATIVE NUTRIENTS label to the CDFA for approval until December 22, 2010, ten days after Applicant's first sale on December 12, 2010. McPherson Depo. at pp. 140-141. And Opposer has already conceded that it did not begin labeling its products until January of 2011, *after* the CDFA approved its product labels. Opposer's Brief at 14. The evidence shows that Opposer was still in the process of designing its labels while Applicant was already selling its NATIVE NUTRIENTS fertilizers on December 12, 2010.
- Opposer submitted two invoices issued by a third party trucking company, [REDACTED] for "hauling mushroom compost", dated 12/3/10 and 12/7/10. McPherson Depo., Exs. 6, 7. However, **Lee McPherson testified that these were merely shipments of compost**

from [REDACTED] to Opposer, not shipments from Opposer to customers. *Id.* at pp. 21-23. The transport of goods from a third party (e.g., a manufacturer) to the trademark owner and not to the consuming public is not a bona fide use in the ordinary course of trade. *See Clorox, supra*, 108 USPQ2d at 1086 ("such transportation of goods from a manufacturer to the owner of the trademark, even when the goods bear the trademark, is purely a delivery of the goods to the trademark owner in preparation for offering the goods for sale and, therefore, does not constitute *bona fide* use of applicant's mark in commerce"); *see also Avakoff v. Southern Pac. Co.*, 765 F.2d 1097, 226 USPQ 435 (Fed. Cir. 1985); accord, *General Healthcare Ltd. v. Qashat*, 364 F.3d 332, 70 USPQ2d 1566 (1st Cir. 2004).

Further, the [REDACTED] invoices do not contain any reference to NATIVE NUTRIENTS whatsoever, and there is no evidence suggesting the allegedly shipped goods were actually labeled with the mark. It is likely that [REDACTED] was simply carrying shipments of loose, unlabeled compost from a manufacturer (i.e., a compost producer) to Opposer. Such shipments of loose, unlabeled compost from a trucking company to Opposer (and not to the public) did not create any rights.

- An invoice from a shipping company called [REDACTED] for delivery of *packaging supplies* to Opposer. McPherson Depo. at p. 36, Ex. 23. There is no reference to NATIVE NUTRIENTS, and the mere purchase of packaging supplies is not a sale of NATIVE NUTRIENTS products. Opposer may have *intended to use* the packaging materials to sell fertilizer on a future date, but prior to actual sales, the mere purchase of packaging supplies was not a sale of NATIVE NUTRIENTS goods to the public and did not create any rights.

5. Opposer's Alleged Website Did Not Create any Trademark Rights

Opposer argues that it gained priority rights "no later than October 2010" based on its alleged operation of a website promoting NATIVE NUTRIENTS at the domain *www.mtedenorganics.com*. Opposer's Brief at 16. However, the mere use of a trademark in the advertising or promotion of goods in the United States is insufficient to constitute use of the mark in commerce, within the meaning of the Trademark Act, where the advertising or promotion is unaccompanied by any actual sale or transport of the goods in commerce. *See Clorox, supra*, 108 USPQ2d at 1086 (rejecting applicant's argument that its website constituted use of a mark for goods). Opposer has not demonstrated that it made a single sale of NATIVE NUTRIENTS goods through its website in 2010, and mere advertising on a passive website did not constitute use of the mark for fertilizers as a matter of law.

Turning to Opposer's alternative argument based on analogous use, (i.e., "nontechnical use"),⁶ Opposer has simply failed to submit **any** evidence of the existence of a NATIVE NUTRIENTS website in 2010. The alleged existence of the website in 2010 is based solely on Lee McPherson's testimony, which is inconsistent at best. For example, Opposer's own interrogatory responses unequivocally state that the website was uploaded in 2012, directly contradicting Lee McPherson's testimony that a website existed in 2010:

INTERROGATORY NO.8:

State all facts RELATING TO how YOU promoted the NATIVE NUTRIENTS mark during the last four (4) years

Response: The NATIVE NUTRIENTS mark has been promoted in the following manners during the last four (4) years:

. . . .

⁶ Opposer objects to Opposer's attempt to litigate the unpled issue of analogous use, raised for the first time in its Trial Brief. *See* "Separate Statement of Objections", attached hereto. The Board should not consider Opposer's argument regarding "nontechnical use".

Also as set forth above in response to Interrogatory No. 1, Opposer secured the domain name MtEdenOrganics.com at some point prior to February of 2011. No later than **March 13, 2012** the Opposer's trademark NATIVE NUTRIENTS appeared on the web site posted to MtEdenOrganics.com The web site and NATIVE NUTRIENTS' use thereon has been in continuous operation since being first posted on **March 13, 2012**.

Interrogatories, No. 8 (emphasis added); *see id.*, Response No. 1 (restating same admission).

This is just another example of the glaring inconsistencies in Lee McPherson's story. The lack of evidence and *Opposer's own admissions* confirm that no such NATIVE NUTRIENTS website existed in 2010.

Even if the website existed in 2010, there is ***no evidence*** showing that even a ***single*** consumer saw this alleged website in 2010. Opposer has not submitted any screenshots or printouts of the website as it purportedly appeared in 2010, and has not furnished any data or analytics regarding how many consumers—if any—saw the alleged website in 2010. No sales were made through the website. Thus, Opposer has hardly shown the required "substantial impact on the purchasing public" required to prove analogous use. *New Look Party, Ltd. v. Louise Paris, Ltd.*, 2012 U.S. Dist. LEXIS 9539 (S.D.N.Y. Jan. 11, 2012) citing *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1162 (Fed. Cir. 2002); *see also PNC Fin. Servs. Gp.*, 2013 TTAB LEXIS 549 (TTAB 2013)(no evidence regarding how many persons viewed or were exposed to the website). Accordingly, Opposer's "website" did not create any rights for Opposer prior to Applicant's first use on December 12, 2010.

Overall, the evidence shows that Opposer may have been *preparing* to sell NATIVE NUTRIENTS products in "December 2010", but it did not make any actual sales until 2011 or later. This is consistent with Opposer's pleaded first use of "March 2011", the "first use" date appearing in its own complaint, its trademark application, and the vast majority of its evidentiary

materials, which generally show sales from 2011 onward. At best, a highly questionable cash sale to an individual vaguely identified [REDACTED] may have occurred on December 16, 2010, but this was four days after Applicant's first sale on December 12, 2010. Whether the sale even occurred at all is highly doubtful given Opposer's vague and inconsistent testimony. Last, none of the sales of loose, unlabeled compost by Lee McPherson directly to his own father were "bona fide sales in the ordinary course of trade". These were mere token sales between father and son which could hardly qualify as a legitimate, arms-length transaction with a consuming member of the public. Accordingly, Opposer has failed to show priority of use.

VI. APPLICANT HAS PRIORITY OF USE

Applicant's first sale on December 12, 2010 predates the earliest priority date on which Opposer can rely. Opposer summarily dismisses Applicant's early sales as merely "in-state" sales, which it argues cannot establish priority. *See* Opposer's Brief at 17 ("These initial sales [in December of 2010] were in-state in the State of California and did not affect interstate commerce as required by the Act"). Opposer's clear misunderstanding of the law is fatal to its claim. It is well established that priority may be based on intrastate use of a mark. *Maids to Order of Ohio, Inc. v. Maid-to-Order, Inc.*, 78 USPQ2d 1899 (TTAB 2006); *Corporate Document Services, Inc. v. I.C.E.D. Management, Inc.*, 48 USPQ2d 1477 (TTAB 1998). Opposer simply compares the wrong "first use" dates of the parties, focusing on the earliest "interstate" sales and ignoring Applicant's earliest in-state sale on December 12, 2010, which clearly establishes priority for Applicant.

Opposer attacks Applicant's third sale to Bianna Karatov on January 10, 2011 as a "token" sale to a "childhood friend and college roommate". Opposer's Brief at 17. This is a far cry from Lee McPherson's token sale to his own father, and there is nothing in the record

suggesting the sale to Ms. Karatov was not an arms-length transaction. Moreover, Applicant need not rely on this *third* sale to establish priority; its *first* sale to Heather Laughlin occurred earlier on December 12, 2010.

Last, Opposer argues that "none of the receipts submitted in evidence by Applicant show collection of sales tax thus drawing into question the legitimacy of these receipts where they failed to include sales tax, a known requirement by the Applicant". Opposer's Brief at 19. Opposer, an apparent newcomer to the fertilizer business in 2011, would be pleased to learn that California specifically provides a sales tax exemption for fertilizer:

There are exempted from the taxes imposed by this part, the gross receipts from the sale in this state of, and the storage, use, or other consumption in this state of:

. . .

(d) Fertilizer to be applied to land the products of which are to be used as food for human consumption or are to be sold in the regular course of business.

California Revenue and Taxation Code, § 6358. The Board should not give any consideration to Opposer's argument that Applicant's receipts "fail to include sales tax, a known requirement by the Applicant". Overall, it is clear that Applicant's first use was on December 12, 2010, and Opposer has failed to show priority of use before this date.

VII. CONCLUSION

Based on the foregoing, Opposer has failed to carry its burden of proving priority and likelihood of confusion, and Applicant respectfully requests that the opposition be dismissed with prejudice.

SEPARATE STATEMENT OF OBJECTIONS

Pursuant to TBMP § 707.03(c)(5), Applicant makes the following objections to (1) Opposer's attempt to argue, for the first time in its Trial Brief, the un-pled issue of "analogous use", which was never previously litigated or discussed at any time during this proceeding; and (2) Opposer's attempt to introduce various alleged 2008 and 2010 "invoices" into evidence, which are inadmissible hearsay, and Opposer has not satisfied the elements of the "business records" exception to the hearsay rule.

1. Opposer Argues "Analogous Use" for the First Time in its Trial Brief

Applicant objects to Opposer's attempt to litigate—for the first time in this proceeding—a new claim based on "analogous use" of NATIVE NUTRIENTS. Specifically, Opposer now argues in its Trial Brief ("Brief") for the first time that it gained priority of use of NATIVE NUTRIENTS through *analogous use* ("non-technical use") based on the alleged mere existence of a passive website in 2010 promoting NATIVE NUTRIENTS fertilizers. Reliance on priority through analogous use must be pleaded. *See Fair Indigo LLC v. Style Conscience*, 85 USPQ2d 1536, 1537-38 (TTAB 2007) (sufficiency of analogous use pleading). The Notice of Opposition is based on alleged actual use, and there is no reference whatsoever to analogous use in that pleading. Thus, there was no notice to Applicant that Opposer planned to establish priority for its Section 2(d) claim based on analogous use. *Id.* At this final stage in the proceeding, the Board should not allow Opposer to broaden the basis for its claim to include claimed priority by analogous use based on the alleged mere existence of a NATIVE NUTRIENTS website.

2. Opposer's "Invoices" are Inadmissible Hearsay

Opposer has submitted several "invoices" purportedly showing sales of its fertilizers in 2008 and 2010. McPherson Depo., Exs 8, 9, 10, 11, 17. When offered for this purpose, all of

these invoices constitute hearsay under Federal Rule of Evidence 801, and Opposer has not satisfied the elements of the "business records" exception to the hearsay rule. F.R.E. 803(6). Specifically, Lee McPherson admitted he did not sell any fertilizers to [REDACTED] and [REDACTED] or even create the alleged invoices shown in Exhibit 16. Instead, he speculated that these are his father's customers, and that his father created the invoices. At a minimum, Lee McPherson is not a custodian or other qualified witness who can testify about his father's business records. F.R.E. 803(6)(d).

For the other purported invoices of Exhibits 8-11 and 17, Lee McPherson never satisfied any of the requirements of the business records exception. For example, he never testified that the invoices were "kept in kept in the course of a regularly conducted activity of [his] business" or that "making the record was a regular practice of that activity". F.R.E. 803(6)(b)-(c). There are simply no assurances that these invoices are trustworthy—particularly where Mr. McPherson suspiciously "discovered" them immediately after Applicant produced its early invoices in discovery. Accordingly, these invoices are inadmissible hearsay.

Opposer may argue that Applicant waived these objections by not raising them at an earlier time. However, substantive objections "are not waived for failure to make them during or before the taking of the deposition, provided that the ground for objection is not one that might have been obviated or removed if presented at that time." TBMP § 707.03(c)(5). These include, among others, objections based on hearsay. *Id.* When an objection of this type could not have been obviated or removed if presented at the deposition, the Board will consider it even if the objection is raised for the first time in or with a party's brief on the case. *Id.* Testimony regularly taken in accordance with the applicable rules ordinarily will not be stricken on the basis of a

substantive objection; rather, any such objection (unless waived) will be considered by the Board in its evaluation of the probative value of the testimony at final hearing. *Id.*

Here, Lee McPherson could not have obviated the hearsay objection even if afforded an opportunity to do so. He was simply not qualified to testify to the invoices in Exhibit 16 that he did not create. Moreover, **he repeatedly explained that it was not a "normal" but rather a "rare" or "unique" occurrence for him to create invoices for sales of fertilizers to individual consumers such as [REDACTED]** (as opposed to retail stores and distributors). McPherson Depo. at pp. 91, 96, 112. By this admission, it is clear that the invoices—particularly the invoices to [REDACTED]—were not "kept in kept in the course of a *regularly conducted activity*" and that creating invoices for sales to individuals like [REDACTED] was *not* a "regular practice of that activity". F.R.E. 803(6)(b)-(c). The alleged sale to Brenden was admittedly rare and unusual, and therefore Opposer could not have cured the hearsay exception even if given the opportunity to do so.

Under these particular circumstances, Applicant's hearsay objections should be sustained because Lee McPherson plainly could not satisfy the elements of the business records exception to the hearsay rule (or any other exception), even if afforded an opportunity to do so. Without any assurance that the documents were created by Lee McPherson (or by another at his direction), made as part of regular business activities, and kept in the ordinary course of business, the documents indicate a significant lack of trustworthiness. Accordingly, Applicant's hearsay objections should be sustained, and Opposer's "invoices" of Exhibits 8, 9, 10, 11, 16, and 17 should not be considered, or should be afforded little or no probative value.

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Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that a true and complete copy of the foregoing **APPLICANT'S TRIAL BRIEF** has been served on Matthew H. Swyers, counsel for Opposer, on February 2, 2015, via First Class U.S. Mail, postage prepaid to:

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